IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11750 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**NO**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	**NO**
5	Whether it is to be circulated to the civil judge ?	**NO**

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DHIRUBHAI SUPADIABHAI VASAVA - Petitioner
Versus
ARACHSHA DARABSHA PARSI & 1 - Respondents

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Appearance :
MR KUNJAL D PANDYA for Petitioner.
MR TS NANAVATI for Respondent No. 1.
RULE SERVED for Respondent No. 2.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 19/10/2007
ORAL JUDGMENT

1. The petitioner – original opponent No. 1 in Regular Darkhast No. 51 of 1990 and original defendant No. 1 in Regular Civil Suit No. 27 of 1987, has filed this petition under Article 227 of the Constitution of India praying for quashing and setting aside the impugned order dated 14.06.1996, passed by the learned Civil Judge (J.D.), Mandvi (hereinafter referred to as 'the learned Civil Judge') in Regular Darkhast No. 51 of 1990. The petitioner has also prayed by way of an interim relief to stay further operation and implementation of the impugned order.

2. This Court has issued notice on 03.12.2002. At the time of issuance of notice, the Court has recorded the statement made by Mr. Shukla, learned advocate appearing for the petitioner that the petitioner would be agreeable to pay reasonable interest @ 12% p.a. for the delay caused in payment of the installments and stayed the impugned order. The petition was thereafter admitted and rule was issued on 18.02.2005 and ad-interim relief granted earlier was ordered to be continued.

3. It is the case of the petitioner that respondent No.1 herein – original plaintiff filed Regular Civil Suit No. 27 of 1987 for declaration and permanent injunction restraining the petitioner as well as original opponent – defendant No.2 from

interfering with the vacant and peaceful possession of the respondent No.1 from agricultural land bearing Block Nos. 290 and 309 admeasuring in aggregate A. 20-27 Gunthas , situated in Zab. During the pendency and final disposal of the suit and in pursuance of the negotiations between the respondent No.1 on the one hand and the petitioner and respondent No.2 on the other hand, a compromise was effected and the compromise purshish Exh. 36 was passed. Thereupon, the learned Civil Judge recorded a compromise purshish and passed a consent decree on the basis of such compromise terms.

4. It is also the case of the petitioner that in accordance with such compromise, the petitioner and respondent No.2 have purchased the agricultural land bearing Block Nos. 290 and 309 for a price of Rs.78,000/-. This amount was payable in five installments and the petitioner and respondent No.2 was allowed to be continued to remain in peaceful possession and occupation of the suit property. In pursuance of the compromise and the decree passed by the learned Civil Judge in R.C.S. No. 27 of 1987, the petitioner and respondent No. 2 were required to pay Rs.78,000/- in five installments each of one of Rs.15,500/- on 20.05.1988, 20.05.1989, 20.05.1990, 20.05.1991 and Rs.16,000/- on 20.05.1992. In this manner, the petitioner was required to pay Rs.78,000/- by way of

purchase price of the said property. It is also the case of the petitioner that the petitioner was not able to adhere to the schedule provided in the compromise. The petitioner had paid the entire amount of Rs.78,000/- before the time stipulated in the compromise terms. The petitioner had paid Rs.15,500/- on 12.06.1989 in the court of learned Civil Judge and such amount has been withdrawn by the respondent No.1 on 14.06.1989 without any objection.

5. It is also the case of the petitioner that since the petitioner and respondent No.2 could not pay the subsequent two installments in time, the respondent No.1 has filed Regular Darkhast No. 51 of 1990 on 13.06.1990 seeking recovery of possession of the said property from the petitioner and respondent No.2. During the pendency and final disposal of the said Darkhast, the petitioner has deposited the subsequent two installments aggregating to Rs.31,000/- on 31.01.1991 in the Court and resisted the said Darkhast by submitting their reply on 31.01.1991. Thereafter, the petitioner had paid Rs.16,000/- on 09.09.1991 and Rs.15,500/- on 19.12.1991. Thus, the entire amount has been paid by the petitioner and the receipts have bee issued for the same. However, the respondent No.1 has not withdrawn the amount of Rs.62,500/- deposited in the Court.

6. It is also the case of the petitioner that after hearing the respondent No.1 and the petitioner and respondent No.2, the learned Civil Judge had passed an order on 14.06.1996 allowing the Darkhast and issued possession warrant on payment of process fees. At the request of the petitioner, the said order has been stayed upto 24.06.1996 in order to enable the petitioner to approach this Court. The petitioner thereafter preferred Civil Revision Application No. 956 of 1996 which was withdrawn in view of the amendment made in Section 115 of the Civil Procedure Code and thereafter the present petition was filed by invoking the writ jurisdiction of this Court.

7. Mr. Kunjal D. Pandya, learned advocate appearing for the petitioner has submitted that the learned Civil Judge has grossly erred in not appreciating that the compromise terms and the decree passed on that basis is one kind of contract between the parties and, therefore, in the case of the contract for the purchase of immovable property, time is never essence of contract. The respondent No.1 has withdrawn the amount of Rs.15,500/- firstly paid on 12.06.1989 without raising any objection for the delayed payment of the first installment. He has further submitted that the second cheque of Rs.15,500/- deposited in the Court could not be honoured when presented for payment on account of insurmountable

financial difficulties faced by the petitioner. But within six months after such cheque could not be honoured, the petitioner paid not only the due installment but paid further Rs.15,500/- by making a single payment of Rs.31,000/- on 31.01.1991. Thereafter, in the same year, the petitioner has paid further balance amount of Rs.31,000/- on 09.09.1991 and 19.12.1991 and accordingly, the petitioner completed the payment of Rs.78,000/- nearly five months before the total stipulated time available to the petitioner. Mr. Pandya has further submitted that inspite of such payments made by the petitioner, the learned Civil Judge has passed an order allowing the Darkhast application and issuing possession warrant only on the ground that there is a term in the compromise which states that if there is any default in payment of two installments, respondent No.1 was entitled to recover possession of the suit property and the petitioner and respondent No.2 would not be entitled to recover the installment paid by them. On the strength of such penal term, the learned Civil Judge has passed the impugned order.

8. Mr. Pandya has further submitted that the learned Civil Judge failed to appreciate that the default clause contained in the compromise is penal in nature and cannot be enforced as such. The time is not essence of the contract involving purchase of immovable property and the respondent No.1 has

accepted the first delayed payment without any objection. He has further submitted that inspite of the irregularity of the petitioner and the respondent No.2 in making payment of the installments, they have ultimately paid entire amount of Rs.78,000/- before the stipulated date of 20.05.1992. In the face of said clear cut situation and documentary evidence on record, the learned Civil Judge has acted in material irregularity and without taking into consideration the fact that the entire amount of Rs. 78,000/- have been paid on or before 20.05.1992. The learned Civil Judge has clearly erred in completely ignoring and overlooking the payments made by the petitioner and respondent No.2 in the Court. He has not even chosen to mention such fact in his order. The learned Civil Judge has omitted to mention or deal with such conduct of the petitioner and respondent No.2 in making payment of Rs.62,500/- during the pendency of Darkhast and five months before the finally stipulated date for payment. He has further submitted that despite the fact that the petitioner and respondent No.2 had deposited the amounts in the Court, the learned Civil Judge has observed in his order that if the respondent No.1 had refused to accept payment, the petitioner and respondent No.2 should have deposited the amount in the Court and that they have not made such attempt. He has also grossly ignored the fact and observed that even after filing Darkhast application, the petitioner and

the respondent No.2 should have made the payment. These observations made it clear that the learned Civil Judge has passed the impugned order without any application of mind as the amount deposited in the Court was not taken into consideration at all. Mr. Pandya has, therefore, submitted that the impugned order passed by the learned Civil Judge deserves to be quashed and set aside.

9. In support of his submissions, Mr. Pandya relied on the decision of the Hon'ble Supreme Court in the case of **Smt. Periyakkal and others V/s. Smt. Dakshyani, AIR 1983 SUPREME COURT 428** wherein it is held that where in an appeal arising out of an application under Order 21, Rule 90, the parties entered into a compromise and invited the Court to make an order in terms of the compromise which the Court did, the time for deposit stipulated by the parties became the time allowed by the Court and this gives the Court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. True, the Court would not rewrite a contract between the parties but the Court would relieve against a forfeiture clause; and where the contract of the parties has merged in the order of the Court, the Court's freedom to act to further the ends of justice would surely not stand curtailed.

10. Mr. T.S. Nanavati, learned advocate appearing for the respondent No.1, on the other hand, has supported the order passed by the learned Civil Judge and submitted that the payment was not made as per the compromise purshish and the decree passed by the Court and hence, the learned Civil Judge is fully justified in issuing the possession warrant. He has, therefore, submitted that the Court should not exercise its jurisdiction under Article 227 of the Constitution of India and disturb the order passed by the learned Civil Judge.

11. Mr. T.S. Nanavati has further submitted that the judgment relied upon by Mr. Pandya is not applicable to the facts of the present case and it is clearly distinguishable. He has further submitted that in that case, an application for condonation of delay has been made and in that context, the Court has passed the order. He has further submitted that here in the present case, no such application for condonation of delay was made by the petitioner and the Court had no occasion to consider the said aspect of the matter. Simply because the amount has been deposited in the Court by the petitioner would not make him entitle to go beyond the terms of the compromise entered into by the parties. He has, therefore, submitted that the Executing Court is supposed to pass an order in terms of the decree and it is not open for the

Executing Court to go behind the decree.

12. In support of his submissions, Mr. Nanavati relied on the decision of the Hon'ble Supreme Court in the case of **Jai Narain Ram Lundia V/s. Kedar Nath Khetan and others, AIR 1956 SC 359** wherein it is held that when a decree imposes obligations on both sides which are so conditioned that performance by one is conditional on performance by the other, execution will not be ordered unless the party seeking execution not only offers to perform his side but, when objection is raised, satisfies the executing Court that he is in a position to do so. Any other rule would have the effect of varying the conditions of the decree, a thing that an executing Court cannot do.

13. Based on this judgment, he has submitted that since the petitioner and the respondent No.2 have agreed to make the payments within a stipulated period and also agreed that if any default is made in payment of two installments, the respondent No.1 is entitled to take back the possession and amount of installment given would be forfeited. Based on the consent terms, decree was passed and hence, the Executing Court is supposed to act in terms of the decree. He has, therefore, submitted that no interference is required in the order passed by the learned Civil Judge.

14. Mr. Nanavati has further relied on the decision of the Hon'ble Supreme Court in the case of **Hukumchand V/s. Bansilal and others, AIR 1968 SC 86** wherein it is held that though under Order 21, Rule 92 the Court was bound to confirm the sale at once when it dismissed the application Order 21, Rule 90 it was justified in postponing the question of confirmation of sale till the date allowed to the judgment-debtor to pay the amount. But as that time had been granted by the consent of parties, the Court had no power to extend it without the consent of parties. Section 148 would not apply in these circumstances and the executing Court was right in holding that it could not extend time.

15. Based on this judgment, Mr. Nanavati has submitted that no application seeking extension of time for payment of installments as per the consent decree was filed by the petitioner and hence, there is no question of condoning the delay or extending the time for payment of installments which were paid late by the petitioner.

16. Despite service of rule, nobody appears on behalf of respondent No.2.

17. After having heard learned advocates appearing for the

respective parties and after having gone through the impugned order as well as the memo of the petition and the documents produced before the Court, the Court is of the view that there is considerable force in the submission of Mr. Pandya on behalf of the petitioner. It is true that the petitioner has not made the payment in time as contemplated in the compromise purshish. However, the petitioner had made it clear even at the time of issuance of notice that he is prepared to pay interest @ 12% for the delay caused in payment of the installments. It is also a fact to be considered that the petitioner and respondent No.2 have made the payment of entire sale consideration of Rs.78,000/- before the stipulated period and hence, if there is any delay caused, the respondent No.1 is entitled to interest. However on that ground, the respondent No.1 cannot claim possession back nor the amount which is already paid and withdrawn by the respondent No.1 can be forfeited. The Court is also of the view that while passing the impugned order, the learned Civil Judge has not taken into consideration the fact regarding the amount deposited by the petitioner and respondent No.2 in the Court. If these aspects were taken into consideration, the learned Civil Judge would have not observed in his order that if the respondent No.1 had refused to accept the amount, the petitioner and respondent No.2 should have deposited the said amount in the Court. As a matter of fact, the petitioner

and respondent No.2 had deposited the amount of Rs.62,500/- in the Court. The said amount has been deposited during the pendency of the Darkhast and hence, there is no question of observing that even after filing of the Darkhast application, the petitioner and respondent No.2 should have deposited the amount. The Court is, therefore, of the view that the impugned order was passed without application of mind and without taking into consideration, the relevant aspects of the matter. The impugned order, therefore, is bad and requires to be quashed and set aside.

18. It is true that there is some delay in making payment of installments. It is also true that the petitioner had not made any application for extension of time but the very fact that the petitioner had deposited the amount within outer limit, the learned Civil Judge should have considered this aspect and condoned the delay in making the payment, keeping in ming the observations made by the Hon'ble Supreme Court in the case of Smt. Periyakkal and others (supra) that the Court has got the power to extend the period or to condone the delay. The learned Civil Judge has not observed anything with regard to deposit which shows that the order was passed without any application of mind. This issue was not addressed at all nor at any point of time, the respondent No.1 had raised any objection against deposit of the amount before the Court.

It is only when the entire amount had been deposited in the Court and after more than expiry of the period of 5 years when the impugned order was passed, the petitioner came to know about the fact that despite the full payment, the learned Civil Judge had passed the order and issued the possession warrant. In the opinion of the Court, the judgment of the learned Civil Judge is contrary to the provisions of law, equity and justice. Hence, the order is required to be quashed and set aside and it is accordingly quashed.

19. However, one fact still remains that there was delay in payment and hence, since it was rightly agreed before the Court at the time of issuance of notice, the Court hereby directs the petitioner to pay the interest @ 12% p.a. for the delay caused in payment of the installments. The amount so calculated at the rate of 12% should be deposited by the petitioner and respondent No.2 in the Court within two months from the date of receipt of writ or from the date of receipt of the certified copy of this order, whichever is earlier. After deposit of the said amount and the earlier amount which was deposited during the pendency of the Darkhast in the Court and if the same had not been withdrawn by the respondent No.1 so far, the respondent No.1 is allowed to withdraw the said amount. After receipt of the amount, the respondent No.1 is hereby directed to

execute the sale-deed in favour of the petitioner and respondent No.2 forthwith.

20. Subject to the aforesaid direction and observation, this petition is accordingly allowed. Rule is made absolute to the aforesaid extent, without any order as to cost.

Sd/-
[K. A. PUJ, J.]

Savariya